

HERE COMES THE JUDGE

When Does a Licensee Get To See A Real Judge?

When does a licensee accused of wrong-doing get to see a judge in robes? That is, a real judge. A judge appointed by the governor or elected by the people. A judge who can make decisions on all legal and constitutional issues presented. You know...a genuine judicial officer. Usually it's never. Usually, it's an administrative law judge employed by the Department who hears the accusation and issues a proposed decision, not a real judge. It's the Department which accepts or rejects the proposed decision, not a judge at all. It's the Appeals Board which reviews those decisions. Members of the Board are gubernatorial appointees but don't have to be lawyers to be on the Board. They certainly are not judges. Then, the only available review is to the Court of Appeal which consists of real appellate court justices, but the court doesn't have to take the case, and rarely does. Business and Professions Code Section 23089, allows that licensee to seek appellate court review but also allows the Department the same remedy before the same Court of Appeal. When the ABC seeks discretionary appellate court review, it hires the Attorney General. Many view this system inadequate and unfair.

The Department loses a healthy number of cases before the Board which can reverse a Department decision, affirm that decision or remand the case back to the Department for further proceedings. Reversals of Department decisions are handed down by the Board virtually every time it convenes. A decision rendered by the Board cannot be reviewed by

the Superior Court as a matter of right. Parties appearing before most other state agencies do have the right to Superior Court review and therefore a real judge. With ABC cases any party including the ABC can petition only the Court of Appeal for a Writ of Review or the California Supreme Court for a Hearing. Those Courts can grant such petition and review the Board's decision or summarily deny the request. Either way, as anyone who has had a case before the Court of Appeal knows, it can be an expensive proposition. That's true whether the Department or the licensee files the petition.

There have been times when it would appear that the Department has not spent its attorney allowance wisely. For example, in 1998 after losing scores of Appeals Board appeals on a question concerning discovery rights in a multitude of jurisdictions (and appellate court districts) the Department filed petitions for review in just about every appellate court and even in the California Supreme Court. The Court, in each instance, summarily denied each petition as did the California Supreme Court. What did that misguided adventure cost the taxpayer in attorneys' fees paid by the Department to the Attorney General?

Frequently, however, the Department pursues cases to the appellate court where that court's decision would have significant statewide impact. One current example is the case where the Appeals Board determined that the ALJ in a Southern California case failed to accurately and adequately analyze the apparent age of a minor decoy. The apparent age of the decoy is usually in issue and must satisfy the Department's rule in that regard. In this case, the Board found the rule was violated based upon the ALJ's failure. The

Attorney General filed a petition for writ, and the matter is presently pending before the Court of Appeal.

In another example, in Northern California, the Court issued a writ where the Appeals Board reversed a decision of the Department where the important question before the court is whether a fake ID manufactured by computer and not the state satisfies the statutory criteria as a defense in a sale to a minor case. Business and Professions Code Section 25660 references “a document issued by a federal, state, county, or municipal government...” The Courts have upheld such reliance when reasonable and in good faith. The Department now argues that unless the ID is actually manufactured by a government, it cannot be the basis for a defense in a sale to minor case. The licensee responds with an obvious truth that the self-manufactured ID may look exactly like an ID issued by the DMV and would seem reliable in every observable way. In this case pending before the Court, the minor purchased the ID on the streets of San Francisco. It is never a surprise when the ALJ buys the Department’s argument and sustains an accusation, and that’s what happened here. However, based upon around fifty years of court of appeal precedent and its own consistent decisions, the Appeals Board reversed saying, among other things, that since the ID looked genuine and real, the fact that it wasn’t actually printed by the DMV didn’t negatively impact the defense of reasonable reliance on what seemed to be an ID issued by the government. The Department relied on the 1968 Court of Appeal case, *Kirby v. Appeals Board*, for the proposition that reliance on ID that is not issued by the government is not a defense. However, the Court in Kirby was reviewing ID that didn’t purport to come from a governmental entity. The Appeals

Board in the case presently before the Court of Appeal determined that where an ID gives every appearance that it came from a governmental entity and appears to satisfy the statutory criteria, the defense is established even if it turns out the ID actually came from the streets of San Francisco. If the Court reverses the Appeals Board in this instance, it is conceivable that licensees will no longer be able to rely on computer generated false ID for the sole reason that the computer wasn't acting on behalf of the government when it manufactured that identification. It will not matter that the ID in question actually looks more like genuine ID than ID actually issued by the DMV but to someone else. Under that circumstance, the computer ID could look more real and realistic than the found ID since the computer ID was tailor-made for the minor presenting the ID to the clerk, bartender, or waitress. In other words, the licensee could rely on real ID that belonged to someone other than the presenting minor but couldn't rely on ID that was accurate in every way except the date of birth and even had the minor's own name, physical description, address and photograph incorporated into that identification.

A word to the wise: those computer ID's don't pass inspection through scanning devices. The magnetic strip on the back doesn't have the sophisticated technology to fool a scanning system. That's coming. At that point, if the Court rules the way the Department wants, licensees will be fully disarmed and defenseless against minors who buy their fake ID's.

What does this Court review mean to you the licensee? It means that in a system fully weighted in the favor of the ABC, the ABC can still lose cases. Quite clearly the state

statutes and the ABC's rules favor the Department. Many of the laws that enable the Department to go after licensees are strict liability. That means that if the licensee did the act, it doesn't matter what the licensee was thinking or intended. Accusation sustained. The hearing process favors the Department, and the Department's burden of proof is not steep. The hearing officers are Administrative Law Judges who are ABC employees, and they only submit a proposed decision to the Department which can reject or accept. The Appeals Board cannot substitute its judgment for the Department in an appeal.

The best assumption as to the inside decision-making process in the Department is that all Appeals Board decisions in favor of licensees are reviewed for viability of a Department petition to the Court of Appeal. Obviously most Appeals Board decisions adverse to the Department do not generate petitions to the Court of Appeal. Most petitions filed with the Court of Appeal are denied without review. Both licensee and Department have the right to file petitions but unless granted, there is never a real judge in an ABC case.

The ABC still loses cases before the Board. Usually the appellate court stays out. Even with no real judges ever involved, most licensees choose to stand and defend since even a seemingly low grade offense can have such dire consequences. More accurately, most licensees have no choice but to stand and defend against Department accusations. For example, a first offense of a sale to a minor looks like it can be resolved with payment of a fine. But the ABC or the local police will always be back; a second offense if sustained and affirmed on appeal would lead to a suspension; a third such offense will trigger the Department's revocation machine. It's not easy, and it takes a lot of experience and

expertise because the Department hates to lose. But when in the right hands, defeating the Department is always within reach. Real judge or no real judge.